a

CHIEW LIP SENG

v.

PERWIRA HABIB BANK MALAYSIA BHD

b

HIGH COURT MALAYA, KUALA LUMPUR
NH CHAN J
[CIVIL SUIT NO: S5-22-237-89]
1 OCTOBER 1998

c ***EVIDENCE:*** *Witness - Recalling of - Close of plaintiff's case - Whether plaintiff witness could be recalled - Evidence Act 1950, s. 165*

EVIDENCE: *Proof of - Execution of charge document - Onus - Upon whom*

LAND LAW: *Indefeasibility of title and interests - Forged charge - Whether title defeasible - National Land Code 1965, s. 340(2)(6)*

d

The plaintiff sought a declaration that a charge on his property ('the property') to the defendant bank as security for banking facilities was not executed by him and that the signature on the charge document was forged. He also sought a consequential order to have the charge cancelled and for the title deed of
e the property to be returned to him. The plaintiff had suspected his eldest son of the above wrongdoing and the whereabouts of that son was unknown.

At the trial, the plaintiff brought a government document examiner as an expert witness to give evidence that the signature on the charge document was not his. The defendant did not call evidence. The court, then, had to decide on
f the evidence of the plaintiff.

The issues for consideration were: (1) whether the court could recall the plaintiff witness in view of the plaintiff having closed his case; (2) whether the plaintiff should have called the attesting witness of the charge document;
g (3) whether there was forgery; and (4) whether the case of *Doshi v. Yeoh Tiong Lay* relied by the defendant supported its case.

Held:

[1] The plaintiff had already given evidence. Section 165 of the Evidence Act
h 1950 empowers a judge to recall a witness who has already given evidence. But the judge would not have the power to call the witness initially without the consent of both parties.

i

[2] The plaintiff denied that the charge was executed by him. Section 68 of the Act provides that for the purpose of proving the execution of a document required by law to be attested, which is the charge in this instance, the attesting witness has to be called. Thus, the onus was on the defendant to prove that the charge was executed by the plaintiff.

[3] Based on the evidence, the plaintiff was a witness of truth. There was also corroborative testimony from the handwriting expert. The charge, therefore, could be set aside as a result of the forgery (s. 340(2)(b) of the National Land Code 1965).

[4] *Doshi v. Yeoh Tiong Lay* was not a case where the registration of the title was defeasible because it was obtained by forgery under s. 340(2)(b) of the Code. It was, in fact, a case where the protection afforded by the proviso to s. 340(3) of the Code to a subsequent purchaser applied.

[Order for the plaintiff.]

Cases referred to:
Assets Co Ltd v. Mere Roihi [1905] AC 176 ***(refd)***
Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 ***(refd)***
Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 35 ***(refd)***
Fallon v. Calvert [1960] 2 QB 201 ***(refd)***
Frazer v. Walker [1967] AC 569 ***(refd)***
In re Enoch and Zuretzky, Bock & Co's Arbitration [1910] 1 KB 327 ***(refd)***
Laurie v. Raglan Building Co [1941] 3 All ER 332 ***(refd)***
Lim Ker v. Chew Seok Tee [1967] 2 MLJ 253 ***(refd)***
Rex v. Day [1940] 1 All ER 402 ***(refd)***
Rex v. Harris [1927] 2 KB 587 ***(refd)***
Rex v. Seigley [1911] 6 Cr App R 106 ***(refd)***
Rex v. Sullivan [1923] 1 KB 47 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 68, 138(4), 165
National Land Code 1965, ss. 211, 340, (1), (2), (2)(a), (2)(b), (3)
Land Transfer Act 1952 [NZ], ss. 62, 63

Other sources referred to:
Practice Note No 3 of 1970, para 2
Practice Note No 1 of 1977
Practice Note No 4 of 1977
Sarkar on Evidence, 1993, 14th edn, vol 2, p 2023
Taylor on Evidence, 12th edn, para 1477
Tenure and Land Dealings in the Malay States, Dr David Wong, p 361

For the plaintiff - Karpal Singh (YV Wong with him); M/s TC Chong & Rakan-Rakan
For the defendant - P Royan (Kenneth St James with him); M/s Shook Lin & Bok

Reported by Usha Thiagarajah

JUDGMENT

NH Chan J:

In this case, the plaintiff is the registered proprietor of a piece of land held under grant 948 lot 16728 Mukim and District of Kuala Lumpur with a house erected on it known as 5 Lorong Durian, Taman Cheras, 56100 Kuala Lumpur. On 19 August 1985, his second son Chiew Yet Cheong enquired whether he had recently charged the property as security for anybody to obtain banking facilities. He answered in the negative and, feeling suspicious, he went to Kuala Lumpur the next day. He went to his bank, the Oriental Bank, and there he met Mr Neo, an officer of the bank. He asked Mr Neo about the standing of his account with the bank. He was told that his loan had been repaid and that there are $280 still left in the account. The plaintiff pointed out that if the loan had been repaid, then he should have the title deed to his property returned to him. Mr Neo replied that the title was returned but the plaintiff said that it was not returned to him as he had not received it.

On 2 November 1985 the plaintiff lodged a report with the police. He suspected his eldest son Chiew Yek Long had something to do with forging his signature in order to charge the property to a bank as security to obtain banking facilities for his own company. To this day, the whereabouts of this son is unknown. The police are still looking for him.

The plaintiff discovered that the property was charged to the defendant bank. Subsequently, he brought the present action for a declaration that the charge of the property to the bank was not executed by him and that the signature on the charge document was a forgery, and for a consequential order to have the charge cancelled and for the title deed of the property returned to him.

At the trial of the action, the plaintiff testified that the signature on the charge document was not his. He went on to say that he had never been to the law office of Zakaria & Co where the charge was said to have been executed by him. He also said that he had never met Mr Pawancheek bin Marican the lawyer who was said to have attested his signature on the charge. Having heard and seen him giving evidence to the fact that the signature on the charge document was not his signature, the plaintiff has impressed me as a witness of truth.

The government document examiner was also called by the plaintiff to give evidence as a handwriting expert. A hardcover minute book (marked as "W"), a piece of paper (marked as "X") containing specimen signatures and the charge document (marked as "Y") were produced during the case for the plaintiff by a police officer.

The handwriting expert's testimony is to the effect that the signatures contained in the book "W" and the specimen signatures on the piece of paper "X" were written by the same person. But she found the signature marked "Y1" in the charge document "Y" is different from those in "W" and "X". She said, "I found that the signature marked "Y1" in "Y" differs in handwriting and characteristic from the specimens in "X" and "W".

After adducing the above evidence, the plaintiff closed his case and the hearing was adjourned for the defence to decide whether to call any witnesses. At the resumed hearing Mr Wong for the plaintiff applied under s. 138(4) of the Evidence Act 1950 to recall his client. This was strenuously objected to by Mr Royan for the defence on the ground that the plaintiff had already closed his case. In the end I decided to recall the witness myself. I can do this under s. 165 of the Evidence Act 1950. See *Sarkar on Evidence*, 14th edn, (1993), vol. 2, at p. 2023 which says:

> The court has always the power to recall a witness at any stage of the proceedings ... and to put any question it pleases, in any form (s. 165). The judge's power to recall witness, is seldom interfered with by appellate court [*Middleton v. Burned*, 4 Ex 243]. If the examination of the witness has been conducted unskilfully, the court usually examines a witness at the close of his examination, ie, after re-examination. There is no right of re-examination after the interrogation by the court.

In a civil case a judge has no power to call a witness not called by either party without the consent of the parties (*In re Enoch and Zuretzky, Bock & Co.'s Arbitration* [1910] 1 KB 327, *Lim Ker v. Chew Seok Tee* [1967] 2 MLJ 253). But, it appears (if we are to follow the common law of England) that that rule does not apply to a criminal trial. The judge at a criminal trial may call a witness not called by either side, without their consent, if he considers it to be necessary in the interests of justice (*Rex v. Harris* [1927] 2 KB 587, CCA).

Even so, there is a definite limitation placed upon this discretionary power of the criminal court. After the defence has been closed, no witness can be called either by the judge or by either party, unless the reason for such evidence is one which no human ingenuity could have foreseen (*Rex v. Day* [1940] 1 All ER 402). Since the present case is a civil case I shall leave the question

whether the rule applies to a criminal trial in this country to be decided in a case in which the question directly arises.

In the present case, however, the plaintiff had already given evidence. Section 165 empowers a judge to recall a witness who has given evidence. But the judge would not have power to call the witness initially without the consent of both of the parties. "... a judge has power to recall a witness who has given evidence, though he would not have had power to call him initially." – said Pearce LJ in *Fallon v. Calvert* [1960] 2 QB 201, 205.

In *Rex v. Seigley* [1911] 6 Cr App R 106, CCA Hamilton J said (at 107):

> A prisoner, when once he has made himself a witness, is liable, like any other witness, to be recalled for the purpose of answering such questions as the judge permits to be put to him.

In *Rex v. Sullivan* [1923] 1 KB 47 the Court of Criminal Appeal approved this passage from *Taylor on Evidence*, 12th edn, para 1477, which states:

> The judge has always a discretionary power, with which the court above is very unwilling to interfere, of recalling witnesses at any stage of the trial, and putting such questions to them as the exigencies of justice require.

And in *Fallon v. Calvert*, at 205, Pearce LJ said:

> And the principle, so far as civil cases are concerned, has never been doubted. If a party chooses to give evidence, he submits himself to the court to be asked all such questions as justice requires until the case is concluded.

And all of these pronouncements from the common law are embodied in s. 165 Evidence Act. It reads thus:

> The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question.

Upon his recall by the court, the plaintiff confirmed that the signatures in "W" and the specimen signatures in "X" are his own signatures. The only discrepancy is on the date when the specimen signatures in "X" were taken from him. It is stated at the top of the paper "X" that the specimens were taken on "5 June 1989" but the plaintiff in his evidence gave the date he signed his specimen signatures on "X" as "4 June 1989". I am satisfied that

this discrepancy is too slight to affect his credibility in any way. This witness can be forgiven for being unclear on the exact day he gave his specimen signatures. But the important thing is that they are his signatures on "W" and "X" and the signature on "Y" is not his signature. It is not important to know whether he gave his specimen signatures on 5 or 4 June 1989.

After this evidence was concluded, counsel for the defendant submitted that there was no case for him to meet. Mr Kenneth Saint James for the defendant informed the court that the defendant has decided not to call evidence. The position here was the same as if I had asked whether any evidence would be called for the defence and I had received a negative answer from counsel. There is no particular magic about putting counsel to his election not to call evidence. This is how Lord Greene MR put it in *Laurie v. Raglan Building Co.* [1941] 3 All ER 332, at 337:

> However, I do not wish it to be thought that there is any particular magic about that question being asked, because it seems to me that counsel can make it perfectly clear, by the words which he uses and by the way in which he acts, that he does not intend to call any evidence, and, that being so, he must be taken to have given a negative answer to the question which the judge might otherwise have put to him.

This means that at the conclusion of the plaintiff's case, the matter must be dealt with on the evidence as it stands, and the only evidence as it stands is the evidence called by the plaintiff (since counsel for the defendant says that he is not going to call evidence).

Counsel for the defendant submitted that the document that created the charge is the original charge which is lodged at the land office and that was not produced before the court. He argued that it cannot be presumed that the person who signed the original was also the person who signed the duplicate, and the way the National Land Code tries to ensure this is by attestation (s. 211) but, the plaintiff has failed to call the attesting witness. (Pawancheek bin Marican).

The short answer to this argument is that there is an agreed bundle of documents (referred to at the trial as "AB2") and in that bundle at p. 4 is a duplicate of the charge and at p. 5 is the signature of the "chargor". The plaintiff in his examination-in-chief said, thus:

> Q: Look at p. 4 of AB2. Did you execute this document?
>
> A: No.

Q: Look at p. 5 of AB2. Is this signature in Chinese your signature?

A: No.

The plaintiff was not cross-examined on this. Moreover, it is the plaintiff's case that he did not execute any charge of his property to the defendant bank.

The bundle of agreed documents (agreed under O. 27 r. 4) was filed under the direction of Practice Note No. 4 of 1977 which restored Practice Note No. 3 of 1970, para. 2 by repealing Practice Note No. 1 of 1977 (which had previously replaced para. 2 of Practice Note No. 3 of 1970). Practice Note No. 3 of 1970, para. 2 reads as follows:

> An agreed bundle of documents shall in all cases be filed at least seven (7) days before the trial of the action, comprising all relevant documents the authenticity of which is not challenged. Proof of any such document by 'formal production of the original or a copy thereof (or by) any witness tendering it or producing it in court' is unnecessary, notwithstanding the views expressed by the Judge in [1970] 2 MLJ at p. 140. This decision is given pursuant to Order 37 rule 1B(2)(c). The object of thus obtaining admissions is to preclude the necessity of formally proving documents or facts admitted; any party unreasonably refusing or neglecting to admit any document or facts, when called upon to do so – whether pursuant to a notice to admit or to agree the inclusion of any document in an agreed bundle of documents – may be ordered to pay the costs of proof occasioned thereby.

Here the plaintiff denies that the charge was executed by him. Section 68 of the Evidence Act provides that for the purpose of proving the execution of a document required by law to be attested, which is the charge in the present case, the attesting witness has to be called. It seems to me that that throws the onus on the defendant who has to prove that the charge was executed by the plaintiff. Section 68 reads:

> 68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the court and capable of giving evidence.

I am convinced beyond peradventure that the plaintiff is a witness of truth. As an addition to his evidence, which I accept, there is also corroborative testimony from the handwriting expert. Therefore, on the evidence as it stands, I found for the plaintiff by granting the declaration which he sought together with all necessary consequential orders. This is because the charge has become defeasible as a result of the forgery (s. 340(2)(b) National Land Code) and can be set aside.

Section 340(1) and (2) of the National Land Code states:

> 340.(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible –
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

The New Zealand case of *Frazer v. Walker* [1967] AC 569, PC was cited and relied on by counsel for the defendant as if New Zealand land law applies to this country. I think this was mischievous and could be misleading. The headnote reads, at 571:

> Held, (1) that registration under the Land Transfer Act, 1952, conferred upon the second respondents as the registered proprietor a title to the interest in respect of which the appellant was registered, which under sections 62 and 63 was immune from adverse claims (other than those specifically excepted, which were not here relevant), that conception of indefeasibility being central in the system of registration (post, pp. 580F, 585A-C).

It means that, under the Land Transfer Act 1952 of New Zealand, ss. 62 and 63 confer upon the registered proprietor indefeasibility of title ensuring immunity from attack by adverse claim to the land or interest in respect of which he is registered (other than those specifically excepted by these two sections). If the exception in ss. 62 and 63 (of the New Zealand Act) relied on is fraud, then this has been confined by judicial decision (*Assets Co Ltd v. Mere Roihi* [1905] AC 176, 210, PC) to actual fraud by the registered proprietor or his agent. The whole system of registration, in New Zealand land law, pivots round this central conception. Lord Wilberforce who delivered the judgment of the board said (at 580):

> It is these sections [62 and 63] which, together with those next referred to, confer upon the registered proprietor what has come to be called "indefeasibility of title." The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration."

And at p. 585, he reiterated:

> ... their Lordships have accepted the general principle that registration under the Land Transfer Act, 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under sections 62 and 63) immune from adverse claims, other than those specifically excepted.

In this country, we do not have ss. 62 and 63 of the Land Transfer Act of New Zealand. Instead, we have s. 340 of the National Land Code and by s. 340(2)(b) where the registration was obtained by forgery it becomes defeasible and can be set aside (*Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17; [1997] 2 AMR 1813, CA). See Dr David Wong: *Tenure and Land Dealings in the Malay States*, at p. 361:

> Forgery as a ground for vitiating a registered title, as set out in section 340(2)(b) of the Malaysian National Land Code, marks a focal point of difference between the Malaysian Torrens system and those where *Frazer v. Walker* [1967] AC 569 applies.

And a little further down it goes on to say:

> It will be realised that 'forgery' under the Malaysian provision is a distinct ground on its own. The Singapore Land Titles Act, Cap. 276, also expressly sets out 'forgery' as an exception to indefeasibility, but places 'forgery' side by side with 'fraud' subject to the same limitation, *viz.*, that for a registered title to be vulnerable in either case the proprietor (or his agent) must be a party to or have colluded in the 'fraud' or 'forgery'. This would appear to treat forgery as a species of fraud. Under the Malaysian provision, the very fact of forgery suffices by itself in making a registered title defeasible irrespective of the absence of knowledge or implication on the part of the proprietor. In other words, it affects the immediate proprietor even if he be an innocent purchaser for value.

Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 35; FC (which was also relied on by counsel for the defendant) was not a case where the registration of the title was defeasible because it was obtained by forgery under s. 340(2)(b) of the National Land Code. It was in fact a case where the protection afforded by the proviso to s. 340(3) of the Code to a subsequent purchaser applied. There,

Doshi was previously the registered owner of the land. He borrowed from Chooi Mun Sou $130,000 and as collateral security for repayment of the loan, he deposited with Chooi the document of title of the land together with a blank transfer form which was executed by him as transferor. The loan (which carried interest) was to be repaid within three months. When Doshi failed to repay the loan, Chooi transferred the land to Nominees Sdn Bhd which subsequently sold the land to Yeoh Tiong Lay who became the registered proprietor of the land. Gill CJ (Malaya) (with whom Raja Azlan Shah and Wan Suleiman FJJ agreed) said, at 87:

> Turning next to the merits of the case, the learned judge took the view that as the plaintiff [Yeoh Tiong Lay] was for the time being the registered proprietor of the premises, for his title to be defeated under section 340(2)(a) of the National Land Code, the onus was on the defendant [Doshi] to show that the plaintiff was a party or privy to fraud either by Chooi Mun Sou in transferring the land to the Nominee Company or by the Nominee Company in transferring the land to the plaintiff. In this connection he found that no particulars of fraud had been set out in the defence which merely alleged that at the time of the sale of the premises to him the plaintiff had knowledge of the illegality of the loan agreement and notice that the instrument of transfer from Chooi Mun Sou to the Nominee Company was void. Proceeding upon the premises that the plaintiff was an independant and *bona fide* purchaser not bound by any special relationship to either Chooi Mun Sou or the Nominee Company, he found that the defendant had failed to satisfy the court that he had a *prima facie* defence. He also found that the defendant had failed to provide any evidence to show that the plaintiff had not acted in good faith when he caused himself to be registered as proprietor.

The chief justice went on to say:

> As regards the counterclaim, the learned judge found that the allegations therein were directed essentially against Chooi Mun Sou and the Nominee Company. Assuming that fraud, if any, was committed by either of them, the course open to the defendant was to seek a remedy against either of them or both, but that in so far as the plaintiff's claim was concerned such fraud could not defeat the plaintiff's title.

And he concluded thus (at 88, 89):

> Assuming that the loan agreement was illegal so that for that reason the transfer from Chooi Mun Sou to Equitable Nominees was void, and assuming that that transfer was also void because of the falsity of the attestation clause, registration of the transfer from Equitable Nominees to the respondent [Yeoh Tiong Lay] was effective to vest title in him as a registered proprietor notwithstanding that he acquired his interest under an instrument that was void. See *Fraser (sic) v. Walker* [1967] 1 All ER 649.

In other words, even assuming the title of Equitable Nominees was defeasible for fraud (under s. 340(2)(a)) or because it was obtained by a void instrument (under s. 340(2)(b)), since it was not set aside before it was transferred to Yeoh Tiong Lay as a subsequent purchaser, the title of Yeoh was protected by the proviso to s. 340(3) of the Code. The decision of the Federal Court was right. It was unfortunate that Gill CJ (Malaya) had applied the wrong judicial authority to support his judgment when in fact the answer was staring at him in the face right here in the proviso to s. 340(3) all the time. See Gopal Sri Ram JCA in *Boonsom Boonyanit* where he said, at 1850:

> It follows from what we have said in the preceding paragraph – and this is the fourth reason we advance for disagreeing with the learned judge – that s. 340 is constructed in such a fashion as to make defeasible only the title of the immediate acquirer of the land. The section, however, protects a purchaser who, in good faith and for valuable consideration, acquires title to land. It also protects the successors in title of such a purchaser. In our judgment, the words "any purchase" appearing in the proviso to s. 340(3) do not include a registered proprietor whose immediate title is rendered defeasible by one or more of the vitiating elements specified in the second subsection to s. 340 of the Code. Any other construction would, in our view, denude subsection (2) of all effect. The section should be read as making defeasible the title of a proprietor who gets onto the register by means of one or more of the methods specified in the second subsection. However, if such a registered proprietor were to dispose of the land to a third party who, in good faith pays the purchase price, then, the latter, as well as all those who come onto the register after him, take title free of any taint.